[redacted]

[redacted]

[redacted]

[redacted]

No. 73

UNITED STATES OF AMERICA,
Appellant,

vs.

THE STATE OF MISSISSIPPI ET AL.,
Appellees.

APPEAL BY UNITED STATES FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

[redacted]

T. J. [redacted],
Jos G. Gunton,
Adams County,
Jos T. [redacted],
Claiborne County,
[redacted],
[redacted],
[redacted],
Coahoma County,
[redacted],
Harry Lott,
Leflore County,
J. O. Baker, Jr.,
William C. Rubens, Jr.,
W. H. Jolly,
Lowndes County,
B. D. Statham,
Pike County,
Of Counsel for the Respective County Registrar Appellees.

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Counsel for Appellees.

November, 1964.

R. L. Mercer Hall, Inc., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3080

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 73

UNITED STATES OF AMERICA,
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vs.

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APPEAL BY UNITED STATES FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF OF APPELLEES, H. K. WHITTINGTON, Circuit Clerk and Registrar of Amite County; MRS. PAULINE EASLEY, Circuit Clerk and Registrar of Claiborne County; J. W. SMITH, Circuit Clerk and Registrar of Coahoma County; MRS. MARTHA TURNER LAMB, Circuit Clerk and Registrar of Leflore County; T. E. WIGGINS, Circuit Clerk and Registrar of Lowndes County; WENDELL R. HOLMES, Circuit Clerk and Registrar of Pike County

INTRODUCTORY STATEMENT

This suit was described by the dissent below as "a massive assault" on the basic process of State voter qualification. We agree. Viewed realistically, it sought to make over for the State its entire processes of elector quali-

fication in an image to the liking of those who caused the suit to be brought. It attempted to combine into one "super action" eighty-two separate actions seeking eighty-two separate adjudications that patterns and practices of racial discrimination existed in the separate counties of the State of Mississippi. This was accomplished under the claim of an attack on statutory constitutionality. This appeal cannot succeed if the court understands the full extent of the claim which was asserted and the relief which was sought, then assays the claim and relief in the light of basic constitutional tenets and limitations.

The complaint claimed that two sections of the Mississippi Constitution and several statutes fixing qualifications of electors of the State of Mississippi violated the United States Constitution. The relief prayed was a judgment declaring the State's constitutional sections and statutes invalid, and an injunction order was prayed requiring that five criteria, selected by the Department of Justice, be used as the sole basis for qualification of *Negro* voters in Mississippi. The injunction was not only sought against six arbitrarily selected, completely unrelated county registrars, but also against the members of the State Board of Election Commissioners, and the State itself.[1]

The only arguable bases for the declaratory judgment relief sought were (a) § 1971—the statute passed by Congress under its power to enforce the prohibition of the 15th Amendment—as to the constitutional provisions and all but two of the statutes, and (b) the supremacy clause[2] as to the other two statutes (i) requiring completion of applications, and (ii) *permitting* destruction of records. Neither

1. Both of the latter have filed separate briefs.

2. Article VI, Clause 2.

of these bases sustained the complaint filed by the federal Attorney General.

The 15th Amendment *prohibits* discrimination. *It is a veto not a vote.* It does not affirmatively fix any State's qualifications of its electors. The power given to Congress by the second paragraph of the 15th Amendment is the power to enforce a prohibition. This power was exercised by Congress in Subsection (c) of § 1971 in the limited term *"preventive"*. Whether the people ought to have cabined this amendment to their Constitution as a proscription only or whether Congress ought to have so confined the authority granted to the United States in § 1971 are not *judicial* questions.

SUMMARY OF THE ARGUMENT

The complaint contained no allegations of joint action by the six registrars nor did it contain any charge of a combination or conspiracy. Because of the very nature of the reasons alleged, it would have been impossible for the defendants to have acted jointly as to any applicant for registration since, by statute, each defendant is charged with a duty which can only be discharged by him or her within the confines of a single county; and every applicant for registration has only one registrar to whom application can be made. The dismissal of the complaint as to four of the registrar defendants was compelled by lack of venue. Three of these defendants were sued outside of the judicial district in which they resided and one defendant was sued outside of the division of the district of her residence. The court exercised its discretion to dismiss a fifth registrar for misjoinder.

This action was an attempt to collect eighty-two separate pattern and practice suits into a single action

under the aegis of testing constitutionality. If it had been allowed to be maintained in the form the Attorney General now claims to want, it would have had the obvious effect of denying eighty-one registrars their day in court by attributing the actions of other registrars to them. Just as no State registration official can despoil a State's valid laws, so no one of them may by wrongful actions infuse correct actions of others with an element of wrongdoing.

The wide discretion vested in the trial court to drop parties was not abused in dismissing this action as to the registrars sued out of the division and districts of their residence and improperly joined.

42 *U.S.C.* 1971 was the sole basis for this complaint. The second paragraph of the 15th Amendment does not say, "The *Attorney General* shall have power to enforce this article." This power is vested in *Congress*. The Constitution thus makes it clear that there is no "inherent" standing exclusive of § 1971 which will support this action. Under that statute, Congress has only seen fit to give the Attorney General authority to institute "a civil action or other *proper* proceeding for *preventive* relief." The dismissed action did not seek preventive relief. It sought affirmative relief. Its principal prayer was for a declaration that State statutes, valid on their face and capable of constitutional application, were invalid because it was alleged they had been discriminatorily used in the past, and would be so used in the future. This concept is foreign to the nature of preventive relief. Such a concept is erroneous by any test. If an officer has misused a statute, preventive relief would consist of a prohibitory injunction against future misuse. To request a court to act affirmatively to destroy the statute instead of correcting the officer was like asking equity to burn down the barn to get rid of a rat.

Section 1971 operates *"to the contrary notwithstanding"* any State constitutional or statutory provisions. It does not invest the Attorney General with authority to attack such provisions. The Attorney General's assumption that this true meaning of § 1971 enfeebles the statute is erroneous. No unconstitutional activity is thus put beyond the statute's preventive reach, for no person whose actions or threats are attacked can justify unconstitutional conduct on the basis of State law. Prevention is available notwithstanding State law, if any official conduct contrary to § 1971(a) is proven. Regardless of the court's conception of the height of the aim or motive involved or of how basic the right protected might be, a statute is not susceptible of a judicial amendment which would alter the words Congress chose to use.

The complaint dismissed by the court below sought an abstract adjudication of the constitutionality of two constitutional and five statutory provisions of the State of Mississippi established to govern qualification of electors. Such an abstract attack lacks the essential quality of a case or controversy necessary to bring it within the ambit of the judicial power. Just as the court has no prerogative to legislate, so it cannot substitute its social beliefs for the judgment of legislative bodies who are elected to pass laws. These provisions have never received the required State construction to place upon them a fixed meaning which would permit this court to properly rule on their constitutionality.

The structure of the complaint also disregarded the plain requirement of § 1971(a) that it be invoked on behalf of persons shown to be *otherwise qualified* under State law. Voter qualification, a purely personal privilege and right, necessarily has such a degree of individuality as to make

it inappropriate for the "class action" type of assertions which this suit advanced as to constitutionality.

No authority exists to support the invitation extended this court by the government's brief to go beyond the issues raised by this appeal and determine matters not decided by the court below. Their request to the court to now adjudge certain statutes to be in violation of the Supremacy Clause must also fail on its merits since that clause does not strike down statutes simply because they deal with the same subject matter as federal enactments. They must be conflicting. A court, after proper adversary processes have been invoked, must find that there is no way to reconcile the statutes. The government's request to the court to now adjudge other statutes void as *"sophisticated"* discriminations, "in the light of the conditions prevailing in Mississippi of which this court may take *judicial notice*", is nothing more than an invitation to indulge in judicial tyranny. Such a process of deduction proceeds upon one subjective assumption based upon yet another subjective assumption. It would be in violation of every rule of proper adjudication, reason, logic and law.

ARGUMENT

I

The Court Did Not Abuse Its Discretion in Dismissing This Action As to Five of the Registrar Defendants

A

The Separate Actions Asserted Against the Separate Registrars Were Improperly Joined under the Federal Rules of Civil Procedure

It can quickly be seen that the complaint contained no allegation of joint or conspiratorial action among the six registrars. Indeed, it truthfully could not have contained such an allegation because each registrar is invested with statutory authority to register voters only within the confines of a single county. Likewise, applicants must apply only to the registrar of the county in which they reside.[1]

As to defendants, Rule 20(a) of the Federal Rules of Civil Procedure provides:

> "All persons may be joined in one action as defendants . . .
>
> (1) If there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurences
>
> *and,*
>
> (2) if any question of law or fact common to all of them will arise in the action."

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1. Cf. *Reddix* v. *Lucky*, 252 F.2d 930.

This rule demonstrates *two* separate and distinct criteria which must be present to permit the joinder of separate defendants in a single action. Obviously, the rule creates the separate criteria, not merely as reiterations of the same thing but to establish two distinct prerequisites. Any other interpretation would mean that one or the other of the criteria was a useless redundancy. Yet, the appellant's position plainly is that by having made a charge of common use of a set of allegedly unconstitutional laws, the dismissed complaint both constituted such action as a part of the same transaction or occurrence and raised a common question of law.[2]

Appellant also contended that the real parties in interest in whose behalf the claim was made were residents of many areas of the State of Mississippi,[3] and that it was appropriate that the separate interests of all of these real parties in interest be presented in a single suit.[4] What this contention as to plaintiffs overlooked is that the claims so asserted are individual and personal claims of those real parties in interest,[5] and each such party must have been individually shown to be properly situated and circumstanced, at all events, as to age, residency, literacy, sanity and freedom from certain criminal convictions—factors which even the complaint urged as proper—as a prerequisite to any right to relief. This contention does point up, however, that there is no such sameness of "transaction, occurrence, or

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2. Brief for the United States, pp. 68, 69. Only the latter contention is correct.

3. Brief, p. 70.

4. Cf. Rule 17(a) of the Federal Rules of Civil Procedure requiring every action to be prosecuted in the name of the real party in interest or on behalf of a designated use plaintiff.

5. *Reynolds* v. *Sims*, 377 U.S. 533; *United States* v. *Bathgate*, 246 U.S. 220, 227; and *South* v. *Peters*, 339 U.S. 276.

series of transactions or occurrences" as would give rise to a right to join the interests of these plaintiffs in a single suit under Rule 20(a). That rule also pertains to permissive joinder of plaintiffs and makes the same transaction or occurrence requirement as applies in the case of defendants.

Since neither joinder of the claims of the real parties whose rights were asserted by plaintiff, nor the joinder of the defendants were permitted under the provisions of Rule 20(a), the court's action in dismissing the parties improperly joined was valid.[6]

In an analogous case a plaintiff claimed that noxious fumes from two separately owned and operated plants had caused damage. He attempted to join both operations as defendants. The court held that they were improperly joined because the transactions were separate as to each defendant.[7]

As to the joinder of all of the registrar defendants in a single suit, the majority opinion stated:

> "The only nexus is the use of the same registration laws. This is insufficient to support a joint cause of action."

---

6. We do not agree that Rule 20(a) furnishes the correct basis for a test of proper joinder to sustain venue. Rule 82 expressly provides that nothing in the rules is to be construed to extend or limit the venue of actions in the United States District Courts. The right to join defendants under the provisions of Chaper 87 of Title 28 logically must find its basis in joinder rights as they existed prior to the adoption of the rules. However, since the joinder was not even in accordance with the rule, we have not extended the length of the brief to include a discussion of joinder rights prior to the adoption of Rule 20(a).

7. *Stanford* v. *Tennessee Valley Authority*, (D.C., Tenn.) 18 F.R.D. 152. The venue problems present here were not present there and later the causes were consolidated for trial.

To hold to the contrary would have been as far fetched as holding that separate citizens in Mississippi and Tennessee would be jointly suable in an action charging each with littering separate camp sites on the Natchez Trace Parkway in their separate states in violation of the same regulation of the National Park Service, or holding that separately acting Workmen's Compensation Commissioners in separate states, enforcing an identical provision of that law of each respective state, could be joined in a single action. We also fail to comprehend how any such fundamental error of joinder in such a proceeding could be cured merely by according the party brought out of his state or district of residence a separate trial. Such separate trials might be the answer when venue and jurisdiction were present, but if either is not, a rule has been allowed to negate a statute.

As to all registrar defendants except Messrs. Whittington and Holmes, who were residents of the Jackson Division of the Southern District, venue was lacking under 28 *U.S.C.* 1391(b) and 1393(a) governing civil actions of a local nature. These defendants, on their motions[7a] were entitled to be dismissed or to have their cases transferred to the proper venue.[8] As to the defendant, Holmes, he certainly was entitled, on his motion,[9] to be dismissed.

B

The Separate Actions Asserted Against the Separate Registrars Were Improperly Joined Under 42 U.S.C. 1971

The brief of the government now makes it plain that its attorneys hoped to have the court interpret their com-

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7a. R. 45, 48, 51 and 53.

8. 28 U.S.C. 1406(a).

9. R. 61. This defendant also moved for severance and a separate trial, R. 63 and R. 26.

plaint as one for statewide relief not even confined to the six counties whose registrars were named. If such a suit had been allowed, then every registrar would necessarily have been affected by any wrongful action proven against another registrar. A more effective denial or perversion of a litigant's basic right to his or her day in court cannot be envisioned.

Such a procedure is completely contrary to the representations made to Congress by the Department of Justice, in seeking the enactment of what is now 42 *U.S.C.* 1971 (e). In hearings before the Senate Judiciary Committee on March 28 and 29, 1960, former U. S. Judge L. E. Walsh, then Deputy Attorney General, stated the position of the Department of Justice. With reference to the words of subsection (e) which read ". . . after each party has been given notice and an opportunity to be heard . . .", he refused to approve any attempt at definition or amplification. This is what he stated:

> "Mr. Walsh. Yes, they do. This language did not come from a New York lawyer. It came from a lawyer from Louisiana, a very distinguished man, Ed Willis, who is one of the senior members of the House Judiciary Committee. He wanted to make sure that this pattern and practice was not found until everyone had an opportunity to be heard. *These are classic words of art. They mean an opportunity to be heard in argument, an opportunity to present evidence, an opportunity to take advantage of every rule of Federal practice.*
>
> "If we start to spell out what they mean, then you have to spell them out completely, not only the opportunity to be heard, to examine on direct, to examine on cross-examination, to examine on redirect, to make objections to the evidence—I do not think we can spell out all over again the entire rules of civil practice here.

"An opportunity to be heard means to be heard as an adversary in the fullest sense of the word as used in the Federal courts.

* * *

"Mr. Walsh. I do not think there is any doubt as to the meaning of an opportunity to be heard, unless you wanted to give it some special meaning, which we certainly do not. The Department of Justice and the administration have no desire to intrude into the *administration* of the election laws of a State until it has proven by a preponderance of the evidence the existence of a pattern and practice of discrimination and it does not want to do this until everyone who doubts the existence of that pattern has had an opportunity to present evidence to the contrary and been heard in full."[10]

Congressman McCulloch, the sponsor of the 1960 act authored by the Justice Department and its principal proponent, debated with Representation Gross thus:

Mr. Gross: "Now, then, if everyone who may be brought in under this bill is guaranteed his day in Court, that must be found in *some other law;* is that not correct?"

Mr. McCulloch: *"That is not correct. His day in Court is guaranteed in the McCulloch bill, H. R. 11160."*

Mr. Gross: "Is there no other law that guarantees an American citizen the right to have his day in Court?"

Mr. McCulloch: "Oh, yes. All laws, all the accepted practices at common law, or under equity, or under the statute guarantee a citizen his day in Court."

Mr. Gross: "That being true, then why some of the provisions of this bill?"

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10. Hearings before Senate Judiciary Committee on March 28-29, 1960, p. 120.

> Mr. McCulloch: *"We want to make it abundantly clear that under H. R. 11160,* people *who are charged with violation of the law, and of discriminating against* people *on account of race or color may have their* day in Court *and prove that that was not the case."*[11]

The position of the Attorney General in the present litigation would have short circuited every protection which that same department assured Congress would be accorded to litigants circumstanced exactly as these defendants here, and which the sponsor of the legislation and Congress intended to secure. If the present claim had been sustained, eighty-one registrars would be denied their right to their own day in court as an adversary in the fullest sense of the word. Just as no State registration official can despoil a State's valid laws, so none of them may, by their wrongful actions, infuse the correct actions of others with any element of wrongdoing. Section 1971(e) contemplates that pattern and practice actions will be tried against *individuals* as adversaries and on the basis of what *they* each did or omitted. Guilt by association is an anachronism which Congress rejected in this law and which ought to be without vitality in any court today.

The action of the Court under Rule 21 of the Federal Rules of Civil Procedure in dropping five of the registrars as parties is one in relation to which the Court is vested with a wide discretion which may not be reversed in the absence of clear abuse.[12]

The court below did not abuse its discretion in dismissing this action against the defendants, Easley, Smith, Lamb, Wiggins and Holmes on the basis of misjoinder and lack of venue.

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11. 106 Congressional Record 5907, 86th Congress, 2nd Session.

12. *Meyercheck* v. *Givens,* (C.A. 7th) 180 F.2d 221; *Weaver* v. *Marcus,* (C.A. 4th) 165 F.2d 862.

II

Appellant Lacked Authority to Bring or Maintain This Action Against Any Defendant

A

42 U.S.C. 1971 Was the Sole Basis for This Complaint

The genesis of authority for every Federal power is the Constitution of the United States. More precisely, the present litigation looked to the 15th Amendment to furnish it standing.[13] The second paragraph of that amendment *does not* say, "The *Attorney General* shall have power to enforce this article." The people vested this power in the *Congress.*

The power so vested in Congress was the power to enforce the Amendment by appropriate legislation. 42 U.S.C., Section 1971(a), was enacted under the power conferred by Section 2, and Section 2 is the sole and only basis for 1971(a).[14] To merely state these most basic facts is to assert that there was no "inherent" standing in the Attorney General to commence or maintain this litigation, exclusive of such authority as may have been conferred by § 1971 (c).

B

§ 1971 Only Authorizes a Proper Proceeding for Preventive Relief

Legislation enacted on the basis of Section 2 of the Fifteenth Amendment must be limited to legislation appropriate to the correction of any discrimination on account

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13. *Neal* v. *Delaware*, 103 U.S. 370, 389; *Ex Parte Yarbrough*, 110 U.S. 651, 665; *Guinn* v. *United States*, 238 U.S. 347, 363; *United States* v. *Amsden*, 6 Fed. 819, 822; and *Karem* v. *United States*, 121 Fed. 250, 252.

14. *United States* v. *Reese*, 92 U.S. 214; *Guinn* v. *United States*, 238 U.S. 347.

of race or color committed by a State officer in administering State requirements for registration or voting. *Karem* v. *United States*[15] dealt with this question. The Court, speaking through Judge Lurton, discussed the Fifteenth Amendment and the predecessor statute of 1971(a) (§ 2004 Revised Statutes) as follows:

> "The Fifteenth amendment is therefore a limitation upon the powers of the states in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the state, the power of the state to prescribe qualification being limited in only one particular."

And, in *United States* v. *Miller*,[16] the Court spoke thus of the reach of the 15th Amendment and of legislation enacted pursuant thereto:

> "It is manifest that no power is conferred on congress by the second section of the 15th amendment to enact legislation for the regulation and control of elections generally, nor for securing to the citizens of the United States the right to vote at all elections. (The right of suffrage is not inherent in citizenship, nor is it a natural and inalienable right, like the right to life, liberty, and the pursuit of happiness.) Unless restrained by constitutional limitation, the state legislature may lawfully confer the right of suffrage upon such portion of the citizens of the United States as it may deem expedient, and may deny that right to all others.

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15. (6 Cir.) 121 Fed. 250, 255.

16. (D.C., Ind.), 107 Fed. 913, 914, 916.

> "As we have said, this section [§ 5507, Revised Statutes] is bottomed solely on the fifteenth amendment. It cannot be successfully contended that the amendment confers authority to impose penalties for every conceivable wrongful deprivation of the colored man's right to vote."

Under § 1971(c), Congress has seen fit to discharge the power vested in it by delegating to the Attorney General permission to:

> ". . . institute for the United States, or in the name of the United States, a civil action or other *proper* proceeding for *preventive* relief, including an application for a permanent or temporary injunction, restraining order or other order."

The only authority extended is authority to bring a proper proceeding and only such a proper proceeding as seeks preventive relief. These words do not contemplate the creation of a new and unknown judicial proceeding. Their meanings are well defined. We respectfully submit, the word "proper" has the obvious connotation of a proceeding recognized and established by the principles and usages of law. The word "preventive", equally as obviously, was used in contradistinction to affirmative. No authority was advanced for the Attorney General to seek *affirmative* relief. That this is correct is as readily deduced merely from a reading of the statute as the difference between "don't" and "do". It argues itself. Congress must have been cognizant of the fact that they were exercising a power granted by an amendment which proscribed the actions of the States but which did not attempt to invest Congress with any power, ex cathedra, to exercise affirmative prerogatives so vital to State sovereignty.

C

The Dismissed Complaint Sought Affirmative Relief

A principal prayer of the complaint was for a declaration that State statutes were made invalid by discriminations in the past and by appellant's speculations that discrimination could take place under them in the future. The statutes themselves are valid on their face and most certainly are capable of fair and constitutional application, but that point is not at issue here. Whether voter registration statutes of the State of Mississippi are constitutionally valid or void is not material to any question posed by this appeal. As will be demonstrated hereinafter, attacks on constitutionality of State legislation cannot be made in the abstract, nor should such statutes be condemned by this court until they have been construed by the courts of that State.

As to every affirmative aspect of a citizen's qualification to vote, the State is *parens patriae*. Even though this Court has ruled that in a proper suit Congress could authorize the Attorney General to sue to prevent 15th Amendment violations,[17] it must be recognized with equal force that the interest which supports this authorization can go no further than to *prohibit* discrimination, *i.e.*, *preventive* relief. As to relief which establishes or requires a court to establish voter qualification standards different from those set by the State—such relief invades an area so clearly the province of the States that the interest and authority of the national government evaporates. The citizen's affirmative rights in this area are not attributes of national citizenship. The State is the government which is *parens patriae* here.

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17. *United States* v. *Raines*, 362 U.S. 17.

As to the relationship of the State and national governments to their respective citizens, the converse of this very situation was presented in the case of *Massachusetts* v. *Mellon*, 262 U.S. 447, 485. This court held:

> "We come next to consider whether the suit may be maintained by the state as the representative of its citizens. To this the answer is not doubtful. We need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. Ordinarily, at least, the only way in which a state may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois and Chicago District, 180 U. S. 208, 241, 21 Sup. Ct. 331, 45 L. Ed. 497), it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

No power is or could ever be rightfully reposed in a Federal official to thumb through the statutes of the States and pick out those he does not like for a test of constitutionality according to a hypothetical set of facts

which he prepares. If this could be done we might as well be back in the Procrustean era where everyone fit the bed, or else. Procrustes might approve but Liberty cries, "Never!". There could not be any concept more dangerous to the maintenance of our republic, nor one more foreign to the nature of preventive relief.

If an officer has misused a statute which is capable of a valid application, preventive relief would consist of a prohibitory injunction to the officer against future misuse. It was proper for the court below to refuse to act affirmatively to destroy the State's statutes. A proper proceeding for preventive relief would be one in which the court would be requested to correct the offending official—not destroy a statute which the State had authority to enact. Condoning an action which would nullify the statute just to get at the officer's actions would be equivalent to approval of burning down the barn to get rid of a rat.

III

The Attorney General Has Had No Standing under § 1971 to Attack Constitutionality

A

Unconstitutional State Statutes Are Not Involved in Such a Proceeding

Section 1971(a) operates *"to the contrary notwithstanding"* any State constitutional or statutory provisions. Subsection (c) does not attempt to invest the Attorney General with authority to attack the provisions of a State's statutes. It speaks exclusively of acts or practices of persons. Such an attack upon statutes is not, as has been demonstrated in Point II above, within the concept of preventive relief. A statutory attack is also inconsistent

with the words of Subsection (d), which vest jurisdiction in District Courts "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." This language negates the necessity for proceedings by individuals to appeal decisions of voter registrars made as to the personal circumstances of whether or not the individual was otherwise qualified. This shows the statute contemplates action by a registrar and not a proceeding to attack constitutionality. Subsection (e) requires that the rights secured be dependent upon qualification "under State law". The adjudications as to the existence of a pattern or practice of discrimination under that subsection are to be "within the affected area", which is specifically defined as meaning "any *subdivision* of the State". This again indicates that no such *statewide* pattern or practice relief as was claimed by the dismissed complaint was contemplated by Congress.

Among the thousands of pages of Reports of debates in the House and Senate as reflected in the Congressional Record, Reports of Committee Hearings before committees of the House and Senate and Reports by these committees on the Civil Rights Acts of 1957 and 1960, our search has failed to disclose that the idea or suggestion was even mentioned that this enactment might be construed as extending to the Attorney General the authority to attack the constitutionality of a state statute rather than to attack the actions of a State official which deprived or threatened to deprive a citizen of a right or privilege defined in § 1971 (a). In fact, a completely contrary assertion is contained in several meaningful places.

Throughout these proceedings Congress was of the opinion that this 1957 enactment was intended to make criminal prosecutions easier and to enable the Federal

Government to more readily obtain convictions by translating the existing Federal Criminal laws on voting discrimination into the form of injunction proceedings. This is borne out by the following quotation from House Report No. 291, Committee on the Judiciary, 85th Congress, 1st Session, pp. 5 and 6:

> "The proposal does not extend nor increase the areas of Civil Rights jurisdiction in which the Federal Government is entitled to act. Those rights are presently protected by Constitutional amendment and, when violations occur, they are subject to Federal prosecution. *The provisions of the legislation, in fact, merely substitute civil proceedings for criminal proceedings in the already established fields.*"

To the same effect also are remarks in Hearings Before the Subcommittee on Constitutional Rights of Senate Judiciary Committee, 85th Congress, 1st Session, Feb. 14—Mar. 5, 1957, pp. 9 and 29. In the Report of Hearings before the House Judiciary Committee, 86th Congress, 2nd Session, Feb. 9 and 16, 1960, p. 35, the Deputy Attorney General, Ex-Federal Judge Walsh, stated:

> "The identity of the registrar is secondary to his State office. He is here because he is a State officer, *and he is abusing the rights of a State officer.*"

Since a State can not violate a Federal Criminal Statute, obviously the criminal actions which were being converted to the expeditious injunction route of enforcement did not contemplate suits against the State. With equal force it can be reasoned that if the *abuse* of office of a State official is what is aimed at, then that action is not the act of the State but is the responsibility of that official, even

though it is also "State action" subject to constitutional protection.[18]

In December of 1963 Mr. McCulloch and other members of his committee reaffirmed that their attention had been directed to unfaithful administration as evidenced by the following quotation:

> Here, then, is the crux of the problem. For the basic troubles come not from discriminatory laws, but (as the Civil Rights Commission so well expressed in its 1959 report, p. 133) "from the discriminatory application and administration of apparently nondiscriminatory laws." (House of Representatives Report 914, Part 2, 88th Congress, 1st Session, p. 5.)

Appellant's brief quotes from Senator Ervin to indicate that he imagined a right was created in the Attorney General to attack State statutes. We do not interpret his statements to have the meaning they suggest by their italics. In the first place, the remarks were directed to Title III of the bill which was defeated and not to Title IV, which subsequently became the Civil Rights Act of 1957. In the second place, we would not contend that a State could put unconstitutionally discriminatory action by a registrar beyond the reach of a *proper* proceeding for preventive relief under § 1971 by passing an act attempting to authorize the discrimination. The *proper* way such void law could be "set at naught" would be a proceeding against the enforcement official—the registrar—to enjoin or prevent his application of such statute. . . .

The fact that the Attorney General is not invested with authority to attack such provisions in no way enfeebles

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18. See the many cases on this point collected in the Brief for the State of Mississippi Point I, C as well as *Mine Safety Appliances, Inc.*, v. *Forrestal*, 326 U.S. 371, discussed in Point II A of said brief at page 22.

§ 1971. It only limits its operations to the confines of a proper, constitutional respect for State governments. No unconstitutional activity is thus put beyond the statutes' preventive reach. Every word of § 1971 retains its fullest meaning. No person whose actions or threats of actions are contrary to subsection (a) may avoid the thrust of the statute by an attempt to justify proscribed conduct on the basis of a patently void State law. It is even more obvious that such official cannot choose to violate a State law which can be validly administered, and then avoid the consequences of his act by pointing to the law. Prevention is available, in any event, *"notwithstanding"* State law, if any official conduct—State action—violative of § 1971 (a) is proven.

No amount of righteous indignation can alter § 1971. It says what it says. No matter how high the aim or motive nor how basic the rights protected, a statute is not susceptible of executive or judicial *amendment* which would alter the words Congress chose to use. The Attorney General can only proceed within the framework of the 15th Amendment to the Constitution and § 1971.

B

The Court Will Not Make an Abstract Adjudication of Constitutionality

The complaint dismissed by the court below sought an abstract adjudication of the constitutionality of two constitutional and five statutory provisions of the State of Mississippi which that State has established to govern the qualification of all of its electors. This constitutional essay was not sought, in the words of the government's brief, "on behalf of one individual or the inhabitants of a single community."[19] They defined the

19. p. 70.

test being made by the complaint as one which was so unlimited and so intangible as to cover just "wherever and by whomever" the statutes might have been or might be applied. The complaint did not allege any specific application of any law attacked. It was couched completely in vague and abstract terms. It made no case or controversy which was essential to bring it within the ambit of the judicial power.

In the case of *Muskrat* v. *United States*, 219 U.S. 346, this court laid out an apt definition of what factors had to be present to bring a request for a decision on the constitutionality of legislation within the judicial power.

> "What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies.' A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy?' That question was dealt with by Mr. Justice Field, at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:
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> "The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. Chisholm v. Georgia, 2 Dall. 431, 432, 1 L. Ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then

it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."

* * *

See also, in the connection, Chicago & G. T. R. Co. v. Wellman, 143 U.S. 339, 36 L. Ed. 176, 12 Sup. Ct. Rep. 400. On page 345 of the opinion in that case the result of the previous decisions of this court was summarized in these apposite words by Mr. Justice Brewer, who spoke for the court:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.";

The court refused relief in that case with this reasoning:

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly

instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends.

In *Smith* v. *Indiana*, 191 U.S. 138, a claim by a public officer in behalf of his constituents, as to whom he had an official duty, was refused in these words:

> "Different considerations, however, apply to the jurisdiction of this court, which we have recently held can only be invoked by a party having a personal interest in ths litigation. It follows that he cannot sue out a writ of error in behalf of third persons. *Tyler* v. *Registration Court Judges*, 179 U.S. 405, 45 L. Ed. 252, 21 Sup. Ct. Rep. 206; *Clark* v. *Kansas City*, 176 U.S. 114, 44 L. Ed. 392, 20 Sup. Ct. Rep. 284; *Turpin* v. *Lemon*, 187 U.S. 51, 47 L. Ed. 70, 23 Sup. Ct. Rep. 20; *Lampasas* v. *Bell*, 180 U.S. 276, 45 L. Ed. 527, 21 Sup. Ct. Rep. 368; *Ludeling* v. *Chaffe*, 143 U.S. 301, 36 L. Ed. 313, 12 Sup. Ct. Rep. 439; *Giles* v. *Little*, 134 U.S. 645, 33 L. Ed. 100[illegible], 10 Sup. Ct. Rep. 623. These authorities control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained

nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, *viz.*, the taxpayers, and in this particular the case is analogous to that of *Caffrey* v. *Oklahoma*, 177 U.S. 346, 44 L. Ed. 799, 20 Sup. Ct. Rep. 664. We think *the interest of an appellant in this court should be a personal, and not an official, interest,* and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision.

On certiorari to the Supreme Court of Mississippi, Chief Justice Hughes, writing for a unanimous court, presented the principle and authorities in *Columbus C. & G. Railroad Company* v. *Miller*, 283 U.S. 96, 100. These were the court's words:

". . ..the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the amendment forbids.[2] The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."[3]

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2. Clark v. Kansas City, 176 U.S. 114, 118, 20 S. Ct. 284, 44 L. Ed. 392; Standard Stock Co. v. Wright, 225 U.S. 540, 550, 32 S. Ct. 784, 56 L. Ed. 1197; Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078; Roberts & Schaefer Co. v. Emmerson, Secretary, 271 U.S. 50, 54, 55, 46 S. Ct. 375, 70 L. Ed. 827, 45 A.L.R. 1495; Liberty Warehouse Co. v. Burley Tobacco Growers' Association, 276 U.S. 71, 88, 48 S. Ct. 291, 72 L. Ed. 473.

3. Smith v. Indiana, supra; Braxton County Court v. West Virginia, 208 U.S. 192, 197, 198, 28 S. Ct. 275, 52 L. Ed. 450; Marshall v. Dye, 231 U.S. 250, 257, 34 S. Ct. 92, 58 L. Ed. 206; Stewart, Treasurer, v. Kansas City, supra.

The authorities were recently collected by the Court in *Coffman v. Breeze Corporation, Inc.*, 323 U.S. 316, 324, 325.

"The declaratory judgment procedure is available in the federal courts only in cases involving an actual case or controversy, Nashville, Chattanooga & St. Louis Railway Co. v. Wallace, 288 U.S. 249, 258-264, 53 S. Ct. 345, 346-348, 77 L. Ed. 730, 87 A.L.R. 1191; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239, 240, 57 S. Ct. 461, 463, 81 L. Ed. 617, 108 A.L.R. 1000, where the issue is actual and adversary. Chicago & Grand Trunk Railway Co. v. Wellman, 143 U.S. 339, 12 S. Ct. 400, 36 L. Ed. 176; South Spring Gold Co. v. Amador Gold Co., 145 U.S. 300, 301, 12 S. Ct. 921, 36 L. Ed. 712, and it may not be made the medium for securing an advisory opinion in a controversy which has not arisen. State of New Jersey v. Sargent, 269 U.S. 328, 46 S. Ct. 122, 70 L. Ed. 289; United States v. West Virginia, 295 U.S. 463, 55 S. Ct. 789, 79 L. Ed. 1546; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 324, 56 S. Ct. 466, 472, 80 L. Ed. 688; Anniston Manufacturing Co. v. Davis, 301 U.S. 337, 355, 57 S. Ct. 816, 824, 81 L. Ed. 1143; Electric Bond Co. v. Commission, 303 U.S. 419, 443, 58 S. Ct. 678, 687, 82 L. Ed. 936, 115 A.L.R. 105.

"In any case the Court will not pass upon the constitutionality of legislation in a suit which is not adversary, Chicago & Grand Trunk Railway v. Wellman, supra; Bartemeyer v. Iowa, 18 Wall. 129, 134, 135, 21 L. Ed. 929; Atherton Mills v. Johnston, 259 U.S. 13, 15, 42 S. Ct. 422, 66 L. Ed. 814, or upon the complaint of one who fails to show that he is injured by its operation, Tyler v. Judges, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252; Hendrick v. Maryland, 235 U.S. 610, 621, 35 S. Ct. 140, 141, 59 L. Ed. 385, or until it is necessary to do so to preserve the rights of the parties. Liverpool, N. Y. & Philadelphia Steamship Co. v. Immigration Commissioners, 113 U.S. 33, 39, 5 S. Ct. 352, 355, 28 L. Ed. 899; Burton v. United States, 196 U.S. 283, 295, 25 S. Ct. 243, 245, 49 L. Ed. 482; Abrams v. Van Schaick, 293 U.S. 188, 55 S. Ct. 135, 79 L. Ed. 278; Wilshire Oil

Co. v. United States, 295 U.S. 100, 55 S. Ct. 673, 79 L. Ed. 1329."

The cases limiting the application of these rules are inapposite. In *Barrows* v. *Jackson*, 346 U.S. 249, the Court acknowledged that it was dealing with a "unique" situation in which *court action* of a State was held to constitute an impending threat of unconstitutional action by the enforcement of a racial covenant. The court there allowed the respondent, *who had been sued for damages totaling $11,600.00*, to contest the constitutionality of such enforcement. It based its decision on the respondent's pocketbook interest and also on the fact that the respondent was the *only* person who could effectively assert the constitutional rights involved. The court held that:

> "it would be difficult if not *impossible* for those whose rights were asserted to prevent their grievances before any court."

The Court fully acknowledged the validity of rules limiting the right of a litigant to raise abstract constitutional issues in cases where it was possible for the person whose rights were involved to secure relief in a case in which a specific application could be presented.

Compare also *National Association for A. of C. P.* v. *Alabama*, 357 U.S. 449, 458, where an association was allowed to assert the rights of its members because their rights there asserted *could not* be protected except through the association because

> "To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion."

No such deficit in the individuals to whom the right asserted belonged, as was found in these cases, exists here.

The identity of everyone whose rights were involved in the dismissed complaint would necessarily be disclosed in making the required showing that they were "otherwise qualified".[20] In truth, the individuals are the *only* proper parties to seek a non-abstract adjudication of constitutionality.

This court recently discussed the cases establishing the rules which guide courts in making or refusing to make adjudications on such constitutional questions in the case of *United States* v. *Raines*, 362 U.S. 17. After stating and discussing the various rules applicable to adjudications of constitutionality, the court pointed out five instances in which those rules might not be applicable. No one of the five is pertinent here for the reasons indicted by each.

(1) Where the constitutional rights of one not a party would be impaired *and* that party would have no effective way to preserve them himself.

[Obviously this exception is not pertinent here since any individual has both a remedy under State law (See *Peay* v. *Cox*, 190 F.2d 132), a right to bring suit against the errant official in the Federal courts (28 *U.S.C.* 1343 and 42 *U.S.C.* 1983), and is the only proper party to present a specific application of a challenged statute to avoid a request for an abstract ruling.]

(2) Where the application of these rules would itself have an inhibitory effect on freedom of speech.

[This exception is likewise inapplicable since voting is a personal privilege. Section 1971 requres an "otherwise qualified applicant". Any proper proof of an illegal deprivation of a vested right would necessarily involve specific proof of individual applications by named citizens.]

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20. See point III, c, *infra*.

(3) Where the statute in question has already been declared unconstitutional in the vast majority of its intended applications.

[The contrary is true here. See, e.g., *Darby* v. *Daniel*, (S.D. Miss.) 168 F. Supp. 170; *Williams* v. *Mississippi*, 170 U.S. 213.]

(4) When a state statute comes to this Court conclusively pronounced as having a particular application.

[No State court adjudication on the meaning of these provisions exists or was alleged to have ever been requested.]

(5) Where this court is able to discern that the creators of the provision would not have desired the enactments to stand at all unless they could stand in their every application.

[We respectfully submit that any attempt to so "discern" here would involve rank and arbitrary guesswork.]

There was not one single challenge contained in the complaint which could not have been advanced with more effect in an action by an individual against a designated registrar. In such an action, the precise application of the statute could be defined and the personal and individual rights allegedly violated by the unconstitutional application could be concretely presented to the courts.

The complaint did not charge that *every* registrar of voters had misused his or her statutory powers in a manner which violated § 1791. Rather, the plain implication is that the complaint negated any contention that *all* registrars had done so.[21] Yet the thrust of the complaint was

21. See Par. 36, R. 6.

said to be an attack on application *statewide* which would have required the Court, in considering the case stated to examine into and determine constitutionality or unconstitutionality of application in a myriad of abstract and hypothetical situations.

The complaint also disclosed on its face that Negroes are registered in the six counties whose registrars were sued (Par. 12, R. 2). While the number who were actually registered under the very laws here attacked, as opposed to previous laws, is not shown, official reports disclose that United States courts have ordered Mississippi voting registrars in some counties to utilize provisions of these same statutes.[22]

Not even this high Court has a prerogative to legislate. It cannot substitute its social beliefs for the judgment of legislative bodies who are elected to pass laws.[23] Mr. Justice Cardozo, in his fluent style, in dissenting in the case of *United States* v. *Constantine*, 296 U.S. 287, 298, 299, stated:

> "The judgment of the court rests upon the ruling that another purpose, not professed, may be read be-

22. *E.g., United States* v. *A. L. Ramsey, Circuit Court Clerk and Registrar, Clarke County, Mississippi, et al.*, (D.C., S.D. Miss., C.A. 1084), decision rendered February 5, 1963, affirmed as modified on rehearing, 331 F.2d 824, 838 (5 Cir., 1964). *United States* v. *State of Mississippi; John Q. Wood, Circuit Court Clerk and Registrar, Walthall County, Mississippi*, (D.C., S.D. Miss., C.A. 1656), decision rendered October 25, 1963. *United States* v. *Wilbur G. Ward, Circuit Court Clerk and Registrar, George County Mississippi, et al.*, (D.C., S.D. Miss., C.A 2540(5)(C)), decision rendered February 19, 1964. *United States* v. *James Daniel, Circuit Court Clerk and Registrar, Jefferson Davis County, Mississippi, et al.*, (D.C., S.D. Miss., C.A. 1655), interlocutory order entered January 4, 1963.

23. *Ferguson* v. *Skrupa*, 372 U.S. 726, 730.

neath the surface and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful. Fletcher v. Peck, 6 Cranch. 87, 130, 3 L. Ed. 162; Magnano Co. v. Hamilton, 292 U.S. 40, 44, 54 S. Ct. 599, 78 L. Ed. 1109. There is another wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion. Ogden v. Saunders, 12 Wheat. 213, 270, 6 L. Ed. 606. The warning sounded by this court in the Sinking Fund Cases (Union P. R. Co. v. U. S.), 99 U.S. 700, 718, 25 L. Ed. 496, has lost none of its significance. 'Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' I cannot rid myself of the conviction that in the imputation to the lawmakers of a purpose not professed, this salutary rule of caution is now forgotten or neglected after all the many protestations of its cogency and virtue."

In *James Everard's Breweries* v. *Day*, 265 U.S. 545, 559, the court stated:

"It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it, this court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground."

The State provisions here attacked have never received *any* construction in the court of Mississippi—a

process which would place upon them a fixed meaning in a definite situation, which meaning is necessary to enable this Court to properly rule upon their constitutionality.[24]

In a case cited with approval by appellant, *Orleans Parish School Board* v. *Bush*, 268 F.2d 78, 80, Chief Judge Tuttle, on the petition for rehearing, succinctly demonstrated the distinction between abstention which was not applicable in that case, but which would have been required here. These are his words:

> "No cause for abstention by the federal court is shown merely because a suit is brought against state officials whose conduct may be affected by untested state legislation. *It is only when the federal court is called on to interpret such state statute or rule on its constitutionality that the rule applies.*"

The same holding was made by the three-judge district court in the case of *Bevins* v. *Prindable* (E.D., Ill.) 39 F. Supp. 708, 713, aff. 314 U.S. 573, another authority cited and relied on in the brief for the United States. The applicable language used in the holding affirmed by this Court was as follows:

> "The reluctance of the federal courts to construe or pass upon the validity of a state statute or a principle of law involving state policies or local property rules, when the construction or application of such statute or principle by the state courts which will not only be authoritative but may remove all proper constitutional objections is readily obtainable, is well illustrated by recent decisions of the Supreme Court. Railroad Commission of Texas v. Pullman Company,

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24. *Government and Civic Employees Organizing Committee, C.I.O., et al.* v. *Windsor*, 353 U.S. 364; *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25; *Harrison* v. *National Association for the A. of C. P.*, 360 U.S. 167.

61 S. Ct. 643, 85 L. Ed.....; Thompson v. Magnolia Petroleum Company, 309 U.S. 478, 60 S. Ct. 628, 84 L. Ed. 876. In the former case the court said [61 S. Ct. 645, 85 L. Ed. .....]: 'In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. * * * The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.'

"The case of Thompson v. Magnolia Petroleum Company, supra [309 U.S. 478, 60 S. Ct. 630, 84 L. Ed. 876], arose in a court of bankruptcy where the court had 'exclusive and nondelegable control over the administration of an estate in its possession,' yet the Supreme Court was of opinion that an undetermined question of Illinois real estate law should be sent to the courts of Illinois for decision instead of being resolved by the bankruptcy court. See, also, Achtien v. Dowd, 7 Cir., 117 F.2d 989."

Though the opposing parties to this appeal hold views as to the meaning of the statutes which are the antithesis of each other, we submit that each of these provisions is clearly susceptible of a constitutional interpretation, and application, and we further submit that it is this Court's inflexible rule that any challenged statutes qualify for construction before destruction.

C

The Complaint Did Not Allege a Cause of Action under § 1971.

By framing the complaint as one seeking an abstract adjudication of constitutionality of State statutes, the Attorney General also ignored another prerequisite to obtaining relief under § 1971. Subsection (c), which extends to that officer authorization to institute suits for the United States does so:

> "Whenever any *person* has engaged or there are reasonable grounds to believe that any *person* is about to engage in any act or practice which would deprive any other *person* of any right or privilege secured by Subsection (a) or (b) of this section, . . ."

Subsection (a) secures the right or privilege to vote to:

> "all citizens of the United States *who are otherwise qualified by law*."

What is the meaning of the phrase, "who are otherwise qualified by law to vote" as used in 42 U.S.C., Section 1971(a)? It is clear from a reading of 1971(a) that that sub-section contemplates and envisions the existence of state requirements for voting which do not *on their face* discriminate because of race or color. The operative language is "all citizens of the United States who are otherwise qualified by law to vote". This, of course, presupposes the existence of valid State requirement for voting. The appellant admits in his brief on their face, none of the constitutional provisions or statutes of the State of Mississippi deprive any citizen of the right to vote because of race or color.

It has been held by this Court that the Fifteenth Amendment, which is the sole and only basis for 1971(a), only protects the right of persons qualified by State law to vote without discrimination as to race or color. In *McPherson* v. *Blacker*, 146 U.S. 1, this Court said:

> "The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State" (146 U.S. 39).

A contemporaneous interpretation of the predecessor statute of 1971(a) gives an identical construction to it.

In September, 1870, the Circuit Court for the District of Virginia decided the case of *Ex parte McIlwee*, 16 Fed. Cas. No. 8,820, which appellant cites with approval. Involved in that case was the refusal of a registration official of the State of West Virginia to permit a person to register to vote on account of his participation as a soldier of the Confederacy in the Civil War. Contrary to a West Virginia statute which barred any such person from voting, the Court found that such person was not "otherwise qualified by law" to vote and had no just complaint as to the action taken, stating:

> "It appears to me that this case does not come within the purview of the statute in question. That it was not the intention of congress to abolish the laws of the several states which prescribe the qualifications of voters, or even alter them, except so far as they were founded upon the distinction of race, color or previous condition of servitude, is sufficiently evident from the words of the first section of the statute which declare it to relate to 'all citizens of the United States who are or shall be otherwise qualified by law to vote.' It cannot be doubted that the meaning of this language is, that these citizens shall be qualified to vote by the law of the state or territory in which they offer to poll. That these persons thus 'otherwise qualified' shall vote without distinction of race, color, or previous condition of servitude is the purpose and intent of the statute. It was clearly the duty imposed upon the petitioner to inquire into the qualifications of the applicant for registration under the laws of the state of West Virginia, and if he found him 'otherwise qualified' he was to register him without distinction of race or color or previous condition of servitude, under the penalty of this act of congress."

The complaint does not allege that any otherwise qualified person has made application for registration to a single one or combination of the defendant registrars

who applied the statutes and constitutional provisions attacked to such otherwise qualified person, so as to deny to him the right to vote on account of race or color. The qualification of voters is a purely personal matter, just as is the determination of the qualification of individual Federal jurors who must demonstrate one by one and each person for himself that, among other things, they are able to read, write, speak *and* understand the English language.[25] The fact that a thorough research fails to disclose any case except *United States* v. *Louisiana*, 225 F. Supp. 353[26] in which the United States has attempted to attack a State statute on a claim that it violates private personal rights of citizens, argues well for the position that they do not have such authority and that the dismissed complaint found its only basis in the imagination of the personnel in the Attorney General's office.

United States v. *Raines, supra*, did not hold that any such abstract action as here brought was permissible. The ruling there was that it was appropriate and competent for Congress to authorize the United States to institute a *preventive relief* action under § 1971 because there was a *public interest* in the observance of the 15th Amendment's prohibition against racial discrimination in voting. Such ruling was made in an action in which designated and described persons were alleged to have presented themselves to Registrar Raines, and it was alleged that his official actions had denied registration to them because of race or

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25. 28 *U.S.C.* 1861 (2).

26. This case was described in the government's brief as a "companion" case. (Brief, p. 63) It was not. These two cases had many distinctions and differences, some of which were demonstrated in the majority opinion below. (R. 1548, 1549) The cases were determined differently, at different stages in the proceedings, on different fact situations, under different pleadings, by different counsel, and before different courts.

color when they were, in fact, otherwise qualified by State law. No challenge of constitutionality of State laws was involved. Only the appropriateness of Congress's designation of the United States in the specific action there brought was determined in *Raines*.

A proceeding under § 1971 by the Attorney General is a kind of hybrid use or class suit in which the plaintiff asserts the rights of others. Such a suit is a manifestly inappropriate vehicle to carry a challenge of constitutionality, particularly where, as here, the members of the class are unknown—and really unknowable, for who can be otherwise qualified if the laws for qualification are unknown. The government acknowledges that their position is a sort of "We want to have our cake and eat it too!" one because, after praying for the destruction of the State's qualification laws, they suggest to the Court that it should create some standards to take the place of those dispatched.

Such a proceeding just simply cannot present positive questions of constitutionality which this Court has long held are only made where a precise application of the law involved is presented in an adversary proceeding with real and personal—not official or public—rights asserted.

IV

The Court Should Not Consider Issues Which Have Not Been Ruled On by the Court Below

Assuming *arguendo* that the Court might not affirm the decision of the court below as to all registrars, it should certainly not accept the invitation extended by the government's brief to go beyond the issues raised by this appeal and make advance rulings on matters not yet even decided by the court below. Such a proceeding would be so completely beyond the appellate review jurisdictio.. which the

court exercises in cases of this kind that it would be completely improper, no matter how the court may view the merits of these matters at this preliminary stage.

The court expressly refused to consider such matters in *United States* v. *Raines*, 362 U.S. 17, 27, 28, in this language:

> "Questions as to relief sought by the United States are posed, but remedial issues are hardly properly presented at this stage in the litigation."

The stage in that litigation at the time of that decision was that the court had allowed an appeal from the granting of a motion to dismiss the complaint. That same reasoning is fully applicable here.

In *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 444, this court declined to pass upon the merits of the case in connection with an appeal, stating:

> "Since the district court did not pass on the merits of the allegations of the complaint, the cause is remanded to it for that purpose."

Also see, *Federal Communications Commission* v. *W.J.R., The Good Will Station*, 337 U.S. 265, 285, and *Polizzi* v. *Cowles Magazines, Inc.*, 345 U.S. 663, 667.

The invitation to the court to depart from long recognized and accepted review procedures is not well taken on its merits.

The supremacy clause does not strike down statutes simply because they might operate upon the same subject matter as Federal enactments. To run afoul of the supremacy clause a statute must *conflict* with the Federal enactment. There must be an irreconcilable intrusion by the State enactment into the area covered by Federal law.[27]

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27. *Riggs* v. *Del Drago et al.*, 317 U.S. 95, 102; *Sinnot et al.* v. *Davenport et al.*, 63 U.S. (22 How.) 227, 242.

In the latter case the court held that the repugnance or conflict must be so direct and positive, that the two acts could not be reconciled or consistently stand together.

The Federal law[28] requires the preservation of registration records for a period of 22 months from the election date involved. The State statute[29] provides that the registrar is not required by State law to retain or preserve these records where no appeal is taken from the registrar's ruling on the applicant's qualification. *The State law does not require the destruction of records* nor does it authorize a registrar to disregard other provisions of Federal law which direct him to maintain and preserve these records for a fixed length of time. The statutes are capable of being completely reconciled and have been so reconciled by the consistent rulings of the Attorney General of the State of Mississippi, who has advised registrars that the State law only *permitted* destruction of records not otherwise required to be preserved by the Federal enactment. When this statute is construed by the Supreme Court of Mississippi, we have no doubt but that a similar construction will result.

Attack is made upon § 3213 of the Mississippi Code of 1942 contending that the statute allows rejection of an applicant for registration

> "for errors or omissions that are not material in determining voter qualification."[30]

Here again the brief for the United States jumps from an erroneous assumption to an unwarranted conclusion. The

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28. 42 U.S.C. 1974.

29. Miss. Code of 1942, § 3209.6.

30. Brief for the United States, p. 97.

recently enacted amendment to 42 *U.S.C.* 1971 (a) provides that otherwise qualified citizens are not to be denied the right to vote because of errors or omissions in application forms which are not *"material"* in determining the individual's qualification under State law. Section 3213 of the *Mississippi Code* provides that it is mandatory for an applicant to complete all blank spaces in the application form properly and responsively; and Section 3209.6 of the *Mississippi Code of 1942* provides that applications shall be designed to exhibit

> "the *essential* facts and qualifications necessary to show that such person is entitled to register and vote."

Under the ordinary rules of statutory construction established by the Supreme Court of the State of Mississippi, statutes relating to the same subject matter must be construed in *pari materia*. The position of the government's brief completely ignores the proper application of such rules of statutory construction which doubtless would be applied if, in the orderly course of procedure, the question were raised and presented to the Supreme Court of the State of Mississippi. When the Mississippi statutes are thus read together, it is only "essential" facts which are required to be properly and responsively answered. We submit that the difference between errors or omissions that are not "material" and errors or omissions that are not "essential" is the difference between Tweedle dum and Tweedle dee, which, according to Lewis Carroll, is no difference at all.

If the true meaning of the laws of the State of Mississippi is not being correctly applied by registrars, correction may be had in accordance with law not in spite of it. We respectfully submit, the government's request for a rash departure from existing legal procedures in the name of expediency, and based upon false assumptions of neces-

sity, should fall on deaf ears. The appeal to this Court to do otherwise is an appeal to emotion not to reason or established legal procedure. It is the same appeal to emotion over law, logic or precedent that is made by the suggestion in the minority opinion, that the Court should not hold that Congress gave the United States the authority to seek redress only for "little wrongs".[31] The men who made this law were elected by State qualified electors and it ought never to be assumed that they legislated without the most solemn regard for the proper demarcation between the Federal and State sovereignties, or that they would knowingly turn the creature loose to devour its creators. They obviously were not willing to authorize a single public officer to invade State functions to correct alleged failings that could be remedied with less drastic and more constitutional procedures.

The Appellant lastly requests this Court to take immediate and unauthorized proceedings relative to the provisions of three Mississippi enactments requiring publication of names of applicants for registration, which the government claims constitutes an invitation to private citizens to challenge these applicants' qualifications. No argument or authority was advanced to demonstrate that these statutes were not within the ambit of the State's authority to fix procedures for qualification of electors. Their reasoning rather proceeds on the fine-spun theory that it is not the explicit words or any objective criteria which nullifies this law; on the contrary, the reasoning is that their *subjective* analysis discloses (since they can see nothing wrong with the words but they still don't like the statute) that this must be a "sophisticated" means of denying or abridging the right of citizens of the United States to vote on account of race, color or previous condition of

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31. R. 1568.

servitude. The reasoning must then proceed to assume that unnamed and unknown persons who might be applicants for registration would, if they did apply, be rejected because of these provisions, although they were otherwise qualified by State law All of this is still not enough. The condemnation of the statute can only be brought to fruition by adding to the *subjective* test of indirection or sophisticated violation, a plea to the Court to "take judicial notice" of conditions prevailing in Mississippi. This adds a *second subjective hypothesis* to the first, which we submit should never be followed by any court. It is nothing less than appeal for a Judge to make a decision based on what he "feels" the case before him warrants.

If an appellate Judge can subjectively determine that a law valid on its face is really a sophisticated violation of the Constitution based upon what he subjectively believes he judicially knows,[32] then the door to judicial tyranny is open.

Contrary to Judge Brown's minority views, if a judge is not careful to disregard his personal beliefs and feelings, he has stripped the blindfold from the eyes of Astraea and weighted her scales. Then, like a crooked referee, all that matters is which side has his favor. Equal justice under law cannot equate with equal justice under judges.

V

Reply to Brief for the United States

The brief for the United States proceeds to discuss not only the method of administration of the various Mississippi

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32. "Judicial knowledge" in the final analysis really means what the judge believes, based upon what he reads in print, sees and hears on the television and radio, or hears from acquaintances —every last bit of which he would reject as hearsay if it was submitted to him in his capacity as a trier of fact.

statutes attacked but also their constitutionality. Appellees contend that such discussions are beside the mark in connection with this appeal inasmuch as the complaint was dismissed for lack of a proper procedural base. It is that part of the lower court's ruling which the appeal brings here for review. Nevertheless, because the opinion of the court below did discuss the statutes and because they were presented in the brief for the appellant, we respectfully submit the following brief resumé.

The meanings of *Davis* v. *Schnell*, (S.D. Ala.) 81 F. Supp. 872, Aff. 336 U.S. 933, and *Yick Wo* v. *Hopkins*, 118 U.S. 356, were correctly expounded by the court below (R. 1551, 1552) and have not been properly explained in the government's brief. Although the opinion wandered, the only decision in *Yick Wo* was that he was wrongfully imprisoned because of improper and discriminatory application of a municipal ordinance and his Writ of Habeas Corpus should be granted. The remarks about the validity of the statute were dicta.

The proper test of the constitutionality of a law is the *mandamus* test suggested in *Yick Wo* and adopted by the lower court (R. 1551, 1552); for only such an objective test would accord with this Court's requirements that the *Constitution* which this Court expounds does not embody any particular set of social or ethical opinions or theory of economics;[33] and its consistent requirement that statutes are to be upheld unless no conceivable set of facts may be advanced in support of their constitutionality;[34] and that proper constitutional construction requires the use of a meaning which will uphold, not destroy.[35] These are but

33. *Otis* v. *Parker*, 187 U.S. 606, 609.

34. *Rast* v. *Van Deman & Louis Co.*, 240 U.S. 342.

35. *United States* v. *Classic*, 313 U.S. 299.

different ways of stating what this Court held in *Goillion* v. *Lightfoot*, 362 U.S. 339, that the conclusion of unconstitutionality must be "irresistible"—tantamount for all practical purposes to a mathematical demonstration of such unconstitutionality.[36] In *Lane* v. *Wilson*, 307 U.S. 268, and *Guinn* v. *United States*, 283 U.S. 347, the Court had before it statutes which were conclusively demonstrated to have no *possible* constitutional application. In the *Guinn* case *no* Negroes were registered voters in Oklahoma prior to the date the "grandfather" clause took effect; therefore, when it exempted *lineal* descendants of qualified voters it, by its inescapable operation, exempted *only* whites. In *Lane* the correction period was so "cabined and confined" as to have the same *obvious* effect. A statute should not be judged unconstitutional as discriminatory unless discrimination *inevitably* results from its application,[37] for *there is not a law that man can conceive that man cannot misapply.*

In appraising *Williams* v. *Mississippi*, 170 U.S. 213, the Court should remember that *it was not a voting case*—it was a case in which the plaintiff complained of being convicted by a jury from which Negroes had been improperly excluded by the process of being required to be qualified electors. Thus, either an invalid qualification law *or* an improper administration would have resulted in the deprivation claimed. The reasoning in that case that either a showing of invalidity or a showing of improper application would have been sufficient, is not appropriate to any contention advanced here.

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36. This present appeal should further be differentiated from *Goillion* because there are many reasons which support each of the statutes here attacked which could be suggested and demonstrated, if the Court wishes.

37. *Cummings* v. *Merchants National Bank*, 101 U.S. 153.

Contrary to the effect of the contentions of the Attorney General the law is well settled that a punitive motive or bad purpose is not to be imputed to a legislature.[38] and even if such a motive or purpose is proven by clear and convincing evidence, the statute is not rendered invalid if, in fact, it can be upheld on other grounds.[39]

The law announced in *Darby* v. *Daniel,* (S.D., Miss.) 187 F. Supp. 170 and the reasoning of the opinion below need no further embellishment.

A glance at the verification of the interrogatories amply demonstrates their apocryphal quality.[40] They are pure hearsay. They were a part of pretrial discovery for a trial that was not conducted. They were not offered in opposition to the motions to dismiss. Those motions were not treated, as they might have been, as a motion for summary judgment. Rule 12 (c), *F.R.Civ.P.* To hold that the answers bolster the complaint when the rules governing the proceeding don't so permit and when neither party made any such request to the trial court, is to make an unwarranted election which changes the record on this appeal, and to deprive appellees of opportunity for rebuttal affidavits.

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38. *Flemming* v. *Nestor,* 363 U.S. 603.

"We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. '[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.' Fletcher v. Peck, 6 Cranch 87, 128."

39. *Stephenson* v. *Binford,* 287 U.S. 251.

40. R. 729, 730.

Supposing *arguendo* that these interrogatories and answers had been or could be considered by the Court, they would still not bolster the legal vitality of the complaint. It did not present a case or controversy and the answers could not breathe life into it. The basic concept was false. It was not lack of any quality the answers could supply, but rather a lack of constitutional standing and the lack of a cause of action under § 1971 that caused it to fail.

The court's action in disregarding these answers was immaterial to a proper decision, but in any event, we submit it was not erroneous.

CONCLUSION

No authorization has been extended to the United States to bring or maintain the complaint dismissed below. The judgment of the court below as to the six defendant registrars should be affirmed for lack of venue, for improper joinder and for lack of authority to maintain the suit.

T. F. BADON,
JOE G. GORDON,
Amite County,
JOE T. DRAKE,
Claiborne County,
SEMMES LUCKETT,
LEON PORTER,
CHESTER CURTIS,
Coahoma County,
AUBREY BELL,
HARDY LOTT,
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